

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**STEVEN B. AUBREY, AND  
BRIAN E. VODICKA,**

**Plaintiffs,**

**V.**

**Civil Action No. 3:19-CV-0056-B**

**D MAGAZINE PARTNERS, L.P.  
ALLISON MEDIA, INC.  
JAMIE L. THOMPSON;  
ROBERT L. ERMATINGER, JR.  
SCOTT ROBERT SAYERS;  
ERIC VAUGHN MOYE;  
CITY OF DALLAS;  
DALLAS COUNTY, TEXAS; and  
DOES 1-20, all whose true names  
are unknown,**

**Defendants.**

**DEFENDANTS SCOTT SAYERS, ROBERT ERMATINGER, JR., AND THE  
CITY OF DALLAS’S RESPONSE TO PLAINTIFFS’ MOTION  
FOR LEAVE TO TAKE JUDICIAL NOTICE**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant, City of Dallas (“the City”), Scott Sayers (“Sayers”, and Robert Ermatinger, Jr. (“Ermatinger”) file this response to Plaintiffs’ Motion for Leave to Take Judicial Notice and would respectfully show the court as follows:

## I. SUMMARY

Plaintiffs filed a Motion for Leave to File Motion to Take Judicial Notice (ECF No. 98) and attached Plaintiffs' Motion to Take Judicial Notice (ECF No. 98-1). The Federal Rules of Evidence 201(d) permits that "[t]he court may take judicial notice at any stage of the proceeding," however the affidavits which Plaintiffs seek the Court to take judicial notice do not meet the kinds of facts that may be judicially noticed. FED. R. EVID. 201(b).

Plaintiffs' Motion for Leave asks the court to take judicial notice of "three (3) additional DPD 'verified' affidavits that contain the exact same materially false statement...." (ECF No. 98 at 2). Each of the three (3) affidavits contains the statement that "[i]t was alleged in the lawsuit that Steven Aubrey threatened "Jihad" the same words used to describe the wars brought by terrorists, and against his life which was filed in court document number 15-08135..."

In Plaintiffs' Second Amended Complaint (ECF No. 54) in paragraphs 78 and 82 they allege this same language used in search warrant affidavits contained material facts that were false, fabricated or misleading. Plaintiffs' Second Amended Complaint attached search warrant affidavits as Exhibits B, C, D which contains this language. Plaintiffs asked the Court to grant leave to file their Motion for Judicial Notice. (ECF No. 98 at 2).

## **II. ARGUMENT AND AUTHORITIES**

"Rule 201 of the Federal Rules of Evidence provides that a court may take judicial notice of an 'adjudicative fact' if the fact is 'not subject to reasonable dispute in that it is either (1) generally known with the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.'" *Taylor v. Charter Medical Corp.*, 162. F.3d 827 (5th Cir. 1998); FED. R. EVID. 201(b).

The facts contained in the affidavits Plaintiffs seek to have judicially noticed are neither generally known nor reasonably indisputable. Thus, the facts of which Plaintiffs ask this court to take judicial notice, do not fall within the meaning of Rule 201. Accordingly, the facts in the referenced affidavits are not appropriate for proof by judicial notice.

WHEREFORE, the City, Sayers and Ermatinger respectfully ask the Court to deny Plaintiff's Motion for Leave to File Motion to Take Judicial Notice.

Respectfully submitted,

CITY ATTORNEY OF THE CITY OF  
DALLAS

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Attorneys for the City of Dallas, Sayers, and  
Ermatinger

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2019, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the following attorney of record who has consented in writing to accept this Notice as service of this document by electronic means:

s/ Amy I. Messer  
Assistant City Attorney